

FILED

OCT 3 1978

MICHAEL RODAK, JR., CLERK

No. 78-274

In the Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE WILCHER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the trial court erroneously required an attorney who had represented petitioner to answer questions at trial in violation of the attorney-client privilege and that the government did not prove before the jury that petitioner's false testimony was material to a grand jury investigation.

A jury in the United States District Court for the Western District of Kentucky convicted petitioner on six counts of mail fraud, in violation of 18 U.S.C. 2 and 1341, and on two counts of perjury, in violation of 18 U.S.C. 1623. The court sentenced petitioner to seven years' imprisonment and imposed a fine of \$11,000. The court of appeals affirmed (Pet. App. A).

1. Petitioner was charged with devising and carrying out a scheme to defraud fire insurance companies by making claims based on false invoices that overstated the value of merchandise destroyed by fire that petitioner had kept in his insured warehouse. The government called Elmer George, petitioner's attorney in the insurance matters, as a witness, and required George to answer questions over petitioner's objection based on the attorney-client privilege. George was required to reveal his client's name (III Tr. 22-24), authenticate various letters and documents that he had signed or prepared (III Tr. 28-29, 34-38, 55, 71-72; IV Tr. 92, 96-97, 100), reveal that he had filed suit against the fire insurance companies to collect benefits on behalf of petitioner (III Tr. 81), explain a term used in a letter he drafted (III Tr. 72-78), and divulge his fee arrangement with petitioner (IV Tr. 118-120). However, the court sustained objections to government questions of George that inquired about what he had been hired to do (III Tr. 22, 25), what he had said to petitioner (III Tr. 73-74), and what petitioner had said to him (IV Tr. 107).

None of the matters about which George testified were protected by the attorney-client privilege. It is settled that the privilege protects only confidential disclosures by a client to his attorney in order to obtain legal assistance. *Fisher v. United States*, 425 U.S. 391, 403 (1976). The privilege does not prohibit disclosure of the attorney-client relationship or the client's identity,¹ fee arrangements,² the general nature of the legal services

¹*Howell v. Jones*, 516 F. 2d 53 (5th Cir. 1975), cert. denied, 424 U.S. 916 (1976); *In re Michaelson*, 511 F. 2d 882 (9th Cir.), cert. denied, 421 U.S. 978 (1975).

²*In re January 1976 Grand Jury*, 534 F. 2d 719, 728 (7th Cir. 1976).

rendered,³ statements that the client expects the attorney to communicate to third persons, or matters of public record,⁴ such as the letters, invoices and interrogatories involved in this case. Furthermore, the privilege does not protect acts or statements by a client or his attorney in furtherance of a crime.⁵ Since George's testimony related only to his attempts to obtain insurance benefits for petitioner, which was the object of petitioner's fraudulent scheme, that testimony was not privileged.⁶

2. Petitioner further contends (Pet. 11-12) that the government failed to meet its burden of proving the materiality to the petit jury of petitioner's false testimony before the grand jury. This claim is also groundless. Materiality is a question of law for the court and not a question of fact for the jury. *Sinclair v. United States*, 279 U.S. 263, 298 (1929); *United States v. Damato*, 554 F. 2d 1371, 1373 (5th Cir. 1977), *United States v. Percell*, 526 F. 2d 189 (9th Cir. 1975). Although the jury did not hear evidence on the materiality of the perjured testimony, the court heard sufficient evidence to make its determination of law. Thus, Charles Bensinger, the foreman of the grand jury, testified before the court that the grand jury was investigating mail fraud, insurance and arson in

³*Colton v. United States*, 306 F. 2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963).

⁴*United States v. Cochran*, 546 F. 2d 27, 29 (5th Cir. 1977).

⁵E.g., *In re Doe*, 551 F. 2d 899 (2d Cir. 1977); *United States v. Hodge and Zweig*, 548 F. 2d 1347, 1354 (9th Cir. 1977).

⁶Indeed, the district court rulings, in limiting the government's examination to matters not involving petitioner's communications, and in prohibiting disclosure of petitioner's statements to George, were more favorable to petitioner than the law requires.

connection with the destruction of petitioner's warehouse (IV Tr. 254). Based on this testimony, the court properly found that petitioner's testimony before the grand jury concerning false invoices and insurance claims was material to the investigation (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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